JD(NY)–02–06
Richmond Hill, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TRINITY CARPENTRY AND SYSTEMS INSTALLATION, INC., and MMMZ CONSULTANTS, INC.[1]
A Single Employer

and **Case No. 2-CA-36578**

DISTRICT COUNCIL FOR NEW YORK CITY AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

***Margit Reiner, Esq.,* New York, New York,**
for the General Counsel.
***Angelo Bisceglie, Esq., (*Bisceglie & Friedman, P.C.)**
Newark, New Jersey, for the Respondents.
***Gary Rothman, Esq.*, (O'Dwyer & Bernstein, LLP)**
New York, New York, for the Charging Party.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge. Pursuant to charges and amended charges filed by District Counsel for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, herein called the Carpenters' Union or the Union, the Director for Region 2, issued a Complaint and Notice of Hearing on April 27, 2005, alleging that Trinity Carpentry and Systems Installation, Inc. and MMMZ Consultants, Inc., a single employer, herein Respondent Trinity and Respondent MMMZ respectively, and together referred to as Respondents, violated Sections 8(a)(1), (2), (3) and (5) of the Act, by providing unlawful assistance and support to Local 124, International Union of Journeymen and Allied Trades, herein called Local 124, evading its obligations under its collective bargaining agreement with the Carpenters' Union, and by unlawfully discharging and or refusing to assign work to employees Fabian Dingwall and Marco Catalan. On September 8, 2005, the Director issued an amendment to the complaint, adding an allegation of supervisory status concerning Eddie Fernandez.

The trial based upon the allegations of the complaint was held before me in New York, New York on October 19 and 20, 2005.[2] At the trial, consistent with prior notice given to Respondents, General Counsel made amendments which were granted, reflecting the correct name of Respondent MMMZ, deleting Atef Abdelmonty as a supervisor and agent and correcting of the name of the Carpenters' Union in one paragraph of the complaint. A brief

[1] The caption was amended at the hearing to reflect the correct name of Respondent MMMZ.

[2] Neither Respondents nor their attorney appeared at the trial.

has been filed by the General Counsel, and has been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization

Respondents are corporations, located at 129-04 91st Avenue, Richmond Hill, New York where they are engaged in the business of furniture delivery, installation and maintenance. Annually, Respondents purchases goods and materials valued in excess of $50,000 directly from suppliers located outside the state of New York.

It is admitted an I so find, that Respondents are and have been employers engaged in commerce within the meaning of section 2(2), (6) and (7) of the Act.

It is also admitted and I so find that the Carpenters' Union and Local 124, are labor organizations within the meaning of Section 2(5) of the Act.

II. Collective Bargaining History

On or about July 1, 1996 Respondent Trinity entered into a collective bargaining agreement with the Carpenters' Union, effective November 4, 1996 to July 1, 2001, herein called the independent c/b/a. The independent c/b/a covers all employees performing work set forth in Article II of that document. On July 3, 2001, Respondent Trinity entered into an "Interim Compliance Agreement," extending the independent c/b/a until the Carpenters' Union negotiated a collective bargaining with Associations whose members perform work similar to the work performed by Respondent Trinity's employees. It further provides that once agreement is reached between the Association and the Union, the wages and benefits set forth in that agreement shall be binding on Respondent Trinity, retroactive to July 1, 2001.

Subsequently, the Association of Wall Ceiling and Carpentry Industries of New York, herein the Association, reached agreement with the Carpenters' Union effective July 1, 2002 – June 30, 2006, herein called the Carpenters c/b/a. On or about April 14, 2003, Respondent Trinity became a member of the Association, granting the Association right to represent it in collective bargaining with the Carpenters' Union. Respondent Trinity admits that since April 14, 2003, it has continued to recognize the Carpenters' Union as the representative of its employees, and that it has been bound to the Carpenters' c/b/a.

The complaint alleges the appropriate unit, as set forth in the carpenters c/b/a, as consisting of all employees defined by Article III of the c/b/a. Respondents in their answer stated that they neither admit nor denied this allegation, as it called for a legal conclusion. Such an answer, which does not specifically deny the allegation, raises no factual issues, and is treated as an admission. *Kane Systems,* 315 NLRB 355, 356 (1994); *Trans Rent-A-Car Co.,* 244 NLRB 208, fn. 3 (1980) *enfd.* 685 F.2d. 444 (9th Cir. 1982). Thus on that basis alone, I find that the unit alleged in the complaint is appropriate.

Moreover, a group of employees with a significant history of representation by a particular Union presumptively constitutes an appropriate unit. To rebut this presumption requires a showing of compelling circumstances sufficient to overcome such a presumption. *University Medical Center,* 335 NLRB 1318, 1336 (2001), *enfd. in pert. part.* 335 F.3d 1079, 1085 (D.C. Cir. 2003); *Radio Station KOMO-AM,* 324 NLRB 256, 262-63 (1997); *Trident Seafoods,* 318 NLRB 738, 759, *enfd. in pert part,* 101 F.3d 111, 117-119 (D.C. Cir. 1996);

Children's Hospital, 312 NLRB 920 (1993).

Here the evidence demonstrates a long bargaining history of representation by the Carpenters' Union in the above described unit. Respondents have adduced no evidence to overcome the presumption that such a unit is appropriate. Thus this evidence, even apart from Respondents failure to deny the complaint allegation, is sufficient to find, as I do that the unit of carpenters is appropriate.

Further, the Board has found a unit limited to carpenters to be appropriate. *Dezcon, Inc.,* 295 NLRB 109, 112 (1989).

Accordingly, I conclude that the unit alleged in the complaint is appropriate, and that the Carpenters' Union is and has been at all times material herein the recognized collective bargaining representative for such employees employed by Respondents.

III. Status of Eddie Fernandez

Eddie Fernandez was employed by Respondent Trinity as a foreman. In that capacity, Fernandez effectively recommended hiring, had the right to send workers off the job, was in charge of jobs by managing the employees under him, the client (the manufacturers for whom Respondent Trinity installs furniture and the end-user (the users of the furniture) as well as the paperwork involved. In that regard, Fernandez assigns jobs based on workers abilities, changes assignments in the middle of a job, and sends workers home in order to impose discipline. When problems arise with Respondents' Trinity clients on the job, Fernandez as foreman would attempt to solve it on behalf of Respondent Trinity.[3]

Based upon the above evidence, I conclude that Fernandez was a supervisor and an agent of Respondent Trinity, as well as Respondent MMMZ.[4] Thus, the possession of any one of the powers enumerated in Section 2(11) of the Act is sufficient to confer supervisory status on individuals having such authority. *Arlington Masonry Supply Co.,* 339 NLRB 817, 818 (2003); *Cypress Lawn Cemetery Assn.,* 300 NLRB 609, 617 (1990). The evidence as set forth above reveals that Fernandez, as foreman possessed and exercised several of the indicia of supervisory authority, including effectively recommending hiring and assigning work while exercising independent judgment, and disciplining workers by sending them home. I therefore conclude that Fernandez was a supervisor of Respondents under Section 2(11) of the Act. *Arlington Masonry, supra.*

Further, even absent a finding of supervisory status, I conclude that the evidence is sufficient to establish that Fernandez was an agent of Respondents. The Board will find agency status where employees would reasonably believe that Fernandez was speaking and acting for management. *D & F Industries, Inc.,* 339 NLRB 618, 619-629 (2003); *Great American Products,* 312 NLRB 962, 963 (1993).

Here the employees by virtue of Fernandez's directing and disciplining them, managing jobs, dealing with clients and end-users, and taking care of paperwork on the jobs, would

[3] The above evidence with respect to Fernandez's status, is derived from admissions from the affidavit of Andrew Marley, president and shareholder of both Respondent Trinity and Respondent MMMZ, as well as the undenied testimony of employee Marco Catalan.

[4] As will be detailed more fully below, I conclude that Respondent Trinity and Respondent MMMZ are and have been single employers under the Act.

reasonably believe that he was speaking and acting for management. Therefore Respondents were responsible for Fernandez's words and actions, *D & F Industries, supra; Great American Products, supra.*

IV. The Single Employer Issue

The Board looks at a number of factors when assigns whether two companies constitute a single integrated enterprise. They include (1) functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Pontiac Ceiling & Partition,* 337 NLRB 120, 122 (2001); *Chariot Marine Fabricators,* 335 NLRB 339, 350 (2001); *Pioneer Electric,* 333 NLRB 1192, 1195 (2001).

Ultimately, single employer status depends upon all the circumstances of the case and is often characterized by the absence of an arm's length relationship found among the companies. *Chariot Marine, supra; NLRB v. Browning Ferris Industries,* 691 F.2d, 1117, 1122 (3rd Cir. 1982).

Here all of the factors relied upon by the Board and the Courts to find single employer status are present. Both Respondent Trinity and Respondent MMMZ have the same officers and shareholders. The three shareholders of both companies, Andrew Marley, Michael Zollo, and Raymond Marten have the same percentage of ownership in each company.

Respondents' tax returns show that Respondent Trinity and Respondent MMMZ constitute a controlled group of corporations, which is an arrangement by which the owners of one corporation have a related company with the same ownership and whereby the companies may allocate certain expenses to one or the other company. Here Respondent MMMZ took no Section 179 allocation, which means that Respondent MMMZ was allocating whatever tax deductions it had for depreciation to Respondent Trinity. Such an allocation signifies that the actual operating company was Respondent Trinity and Respondent MMMZ was not an independent company. The officers were compensated only from Respondent Trinity, and Respondent MMMZ paid no wages for an administrative staff, and had virtually no assets. Although Respondent MMMZ purportedly was a delivery company, it owned no vehicles. All the vehicles used to deliver furniture, allegedly the work of Respondent MMMZ were either owned or leased by Respondent Trinity.

Both Respondent Trinity and Respondent MMMZ share the same office help and facilities, for which as noted Respondent MMMZ paid no rent. The only income received by Respondent MMMZ was transfers from Respondent Trinity to cover Respondent MMMZ's payroll.

All work orders utilized by employees are for Respondent Trinity. The employees wore T-shirts reading "Trinity" and use Respondent Trinity's tools.

Sean McCullough dispatcher and admitted supervisor and agent of Respondent Trinity, also hired, supervised and assigned work to employees of Respondent Trinity, as well as of Respondent MMMZ. Additionally, Fernandez along with several other foreman, supervised employees of both companies, frequently at the same time, on the same job.

The evidence discloses that employees who worked for Respondent Trinity were called "carpenters" and for Respondent MMMZ were called "installers." However, the employees of both companies performed exactly the same work. The work consisted of several employees being assigned to install furniture at a particular location. The employees would go to the job, utilize the work order, refer to floor plans, and install the furniture. If employees needed to be

reimbursed for expenses, both Trinity and MMMZ employees would submit an expense report to Respondent Trinity, and be reimbursed by Reimbursed Trinity. Entry passes and ID's used by both employees of Respondent Trinity and Respondent MMMZ had the name Trinity on them.

Employees of both companies would often work together on the same job, doing the same work. Employees work assignments were given out on a list placed on bulletin boards in the office. One list consisted of union members, while the other list contained the names of non-union employees.[5]

Employees of both Respondent Trinity and Respondent MMMZ attended the same training courses, paid for by Respondent Trinity.

The payroll records of Respondents showed numerous employees who were common to both companies. Most of the MMMZ employees were on Trinity's payroll and were members of the Carpenters' Union. The primary difference between the employees paid by Respondent MMMZ and employees paid by Respondent Trinity, was simply that those employees paid by Respondent Trinity were covered by the carpenter's contract, and received wages and benefits under that agreement, while the employees paid by Respondent MMMZ received substantially lower wages, and no contract benefits.

It is obvious, and I find that Respondent Trinity set up Respondent MMMZ, in order to avoid paying carpenters wages and benefits to some of its employees. It is also clear that Respondents' were intent on hiding from the Carpenters' Union what it was doing.

Employee Fabian Dingwall, who was hired by Respondent Trinity, but paid by Respondent MMMZ, asked both Marley and McCullough why his paycheck said MMMZ. They informed Dingwall, "What you see, you see. Don't ask any questions about it." Employee Catalan, an employee paid by Respondent MMMZ, was told by McCullough that on all Union jobs to which he was assigned, that if someone comes to ask questions about the Union, he should state that he didn't work for Respondent Trinity, and then leave. A few days after Dingwall was hired, he informed McCullough that there were Union stewards on the job. McCullough instructed Dingwall, "Do not say that you're from Trinity. Just take your tools and get out of there, and if you are wearing a Trinity T-shirt, turn it inside out." On another occasion in 2002, while working on an installation job, Dingwall called Marley, and informed him that there were Union people on the job. Marley responded that Dingwall should not tell them he was from Respondent Trinity and get out as soon as possible. Also Dingwall would sometimes be sent out by either Marley or McCullough to check out a job and see if Union workers were there, so Respondent Trinity would know whether they could send Dingwall to these locations to work. On another occasion, in 2003, Dingwall and three other non-union workers were working at an installation under Fernandez as Foreman. A Union steward came in and took everyone's names. Fernandez then has a private discussion with the steward. Fernandez then instructed all the workers to leave, and not have any conversations with the steward. Finally, McCullough admitted in his affidavit that he told MMMZ employees to say that they didn't work for Trinity.

The Carpenters' Union and its Funds filed a grievance against Respondent Trinity, alleging that it failed to make contributions to various benefit funds, under its contract with the Union. The first day of hearing before the arbitrator was held on March 4, 2005. Respondent Trinity approved by its president Andrew Marley. Evidence was taken on that date and

[5] Employee Catalan testified that there were 20 union members, and 8-10 non-union members.

stipulations were entered into by the parties. The hearing was adjourned until June 21, 2005. At that time, the hearing resumed without the appearance or participation of anyone from Respondent Trinity.

The arbitrator issued his decision on June 24, 2005. The arbitrator relied upon evidence adduced at the hearing, particularly a report of and testimony from Gregory Polvere a forensic accounting investigator hired by the Union. Polvere concluded as a result of his audit, relying on many of the facts disclosed above, that Respondent MMMZ was formed as a subsidiary of Respondent Trinity, the companies had "less than an arm's length" relationship, and "essentially Trinity and MMMZ are one in the same."

Polvere also concluded that Respondent Trinity had attempted to circumvent its collective bargaining agreement with the union, by employing carpenters in MMMZ, and that Respondent Trinity had a substantial liability for fringe benefits and underpayment of wages. The auditor concluded further that Respondent owed $1,244,144.70 to the Funds, covering the period January 1, 2002 through December 31, 2003, due to its failure to make payments to carpenters, who were on MMMZ's payroll.

The arbitrator issued his award, finding in favor of the Union and the Funds, and ordered Respondent Trinity to pay $1,316,120.00, a figure which included interest, liquidated damages and audit costs.

My findings set forth above with respect to the relationship between Respondent Trinity and Respondent MMMZ is based on the unrefuted, undenied and credible testimony of Dingwall, Catalan and employee Jose Aguilar, admissions from affidavits of Markey and McCullough, documentary evidence submitted into the record, plus the testimony of and documents submitted by Polvere, the auditor. As noted, Respondent did not appear, and adduced no evidence. Based on the above, I conclude consistent with the decision of the arbitrator, that Respondent Trinity and Respondent MMMZ are "one in the same," with no arm's length relationship, and are and have been a single employer. *Pontiac Ceiling, supra; Chariot Marine, supra; Pioneer Electric, supra;* see also, *McAllister Towing & Transportation,* 341 NLRB NO. 48 ALJD Slip. Op. at 25 (2004).

V. The Refusal to Honor the Contract

Having found that Respondent Trinity and Respondent MMMZ are a single employer and that the unit set forth in Respondent Trinity's contract (employees performing carpenters work as defined in said agreement) is appropriate, it follows that employees of Respondent MMMZ, performing carpentry work, are covered by Respondent Trinity's contract, and that Respondents violate Section 8(a)(1) and (5) of the Act, by failing to apply the contract to such employees. *Don Burgess Construction Co.,* 227 NLRB 765 (1977); *enfd.* 596 F.2d 378, 388 (9th Cir 1979); *Vallery Electric,* 336 NLRB 1272, 1277 (2001), *enfd.* 337 F.3d 446 (5th Cir. 2003); *Sterling Nursing Home,* 316 NLRB 413, 416 (1995); *Schmitz Food,* 313 NLRB 554 (1993).

Here the record overwhelmingly establishes, based primarily on the testimony of several employees, particularly Dingwall, as well as the testimony of and documentary evidence submitted by Polvere, that at least since 2001, Respondents have had a practice of using "installers" employed by Respondent MMMZ, and "carpenters" employed by Respondent Trinity interchangeably, often on the same job, and performing the same work. It is also clear that there were numerous instances, where employees performing carpenters work for Respondent, were not given the wages provided for under the contract, and did not have payments made into the benefit funds as on their behalf required under the collective bargaining agreement. Such

conduct is violative of Section 8(a)(1) and (5) of the Act. *Burgess Construction, supra; Vallery Electric, supra; Sterling Nursing, supra.*

However, the complaint alleges that Respondents have since April 14, 2004, failed to honor the contract with the Carpenters' Union. General Counsel in its brief, moved to amend the complaint to substitute September 11, 2001 for April 14, 2004, under Section 102.17 of the Board's rules and regulations. General Counsel contends in this regard, that the granting of the motion would be "just", since the amendment is not even a new allegation, but only a change in dates, and is not too late to prejudice Respondents. *Folsom Ready Mix,* 338 NLRB 1172, fn. 1 (2003). With respect to prejudice, General Counsel argues that Respondent did not appear at the hearing, and therefore, cannot claim that they were prejudiced by not being allowed to litigate the date of the commencement of the unfair labor practice. I disagree.

While the Board can and has found violations of the Act even where motions to amend the complaint have not been filed, prior to or during the trial, the issue must have been fully and fairly litigated. *Desert Aggregates,* 340 NLRB 289, 292-293 (2003). Here Respondents were never put on notice that it needed to defend against allegations that it refused to honor the contract since September 11, 2001, over 2½ years before the date alleged in the complaint. *New Era Cap Co.,* 336 NLRB 526 (2001). General Counsel's argument that Respondents failure to appear at the hearing, precludes it from asserting prejudice from the late amendment is without merit. Even if Respondents had appeared at the hearing and heard all the testimony, there was no indication in the record, that General Counsel was asserting that Respondents' violated the Act as far back of September 11, 2001. It is significant that General Counsel was aware of all the facts giving rise to the amendment, prior to the trial, and indeed introduced evidence of the arbitration award, covering a period between 2001 and 2003, General Counsel made two other amendments to the complaint, after notifying Respondents of its intention to do so, but yet failed to move to amend the complaint to change the date of this violation, either prior to or even during the hearing. General Counsel has provided no explanation for its failure to make the proposed amendment until its brief. In these circumstances, I find it "unjust" and unfair to Respondents to permit the amendment at this time. *Desert Aggregates, supra,* at 293 (No explanation offered by General Counsel for delay in seeking to amend); *Tel Data Corp.,* 315 NLRB 369, 371 fn. 3 (1994) (ALJ denies post hearing amendment, because General Counsel knew of facts, and gave no reason why motion not made prior to conclusion of hearing). *New Era, supra;* see also, *Consolidated Painters,* 305 NLRB 1061, 1063-1064 (1192) (ALJ affirmed by Board, refuses to grant amendment made at the end of testimony, but still prior to the close of hearing. ALJ concludes that although General Counsel found out about the issue during trial, General Counsel waited too long to make a motion, and that insufficient reasons given to explain the delay, makes amendment "unjust". *New York Post,* 283 NLRB 430, 431 (1987) (Board reverses ALJ's granting late amendment on the last day of hearing).

I emphasize that Respondents failure to appear at the hearing, does not change this analysis, nor eliminate the prejudice to Respondents by General Counsel's unwarranted delay in seeking to amend. Indeed had Respondents known, prior to the trial that General Counsel intended to amend the complaint to increase Respondents liability by 2½ years for their failure to abide by the contract, Respondents may have chosen to appear and defend these allegations. If General Counsel had sought to make such an amendment during the hearing, it would have had a better argument in relying on Respondents failure to appear. However, General Counsel did not do so, and furnished no explanation for such action. Indeed, had General Counsel made such a significant amendment during trial, concerning facts that it knew about prior to the commencement, as here, I would have required General Counsel to notify Respondents of such a proposed amendment, so Respondents could decide whether or not it wished to reconsider its decision not to appear, in light of such a significant amendment.

Based upon the foregoing analysis and authorities,[6] I shall deny the motion to amend the complaint to change the date of the violation to September 11, 2001.[7]

Accordingly, I conclude that Respondents have, as alleged in the complaint, violated Section 8(a)(1) and (5) of the Act since April 14, 2004, by refusing to abide by the contract with the carpenters union, by failing to provide contract wages and benefits to employees performing unit work. *Burgess Construction Co, supra; Vallery Electric, supra; Sterling Nursing, supra.*

VI. The Alleged Discrimination Against Dingwall

Dingwall was hired on September 11, 2001 to perform installation carpentry work. On occasion he would drive a truck or load or unload the truck. When Dingwall was hired, he interviewed with Marley. Marley informed him of his starting salary of $16.50 per hour, and added that he would see how Dingwall works and if he was a good worker, Marley would get him into the Carpenters' Union. Although Dingwall believed that he was being hired by Respondent Trinity, since the sign on the property as well as the trucks said Trinity, he was paid by an MMMZ check. When he spoke to both Marley and McCullough about this, they told him not to ask any questions about it.

After his initial discussion about the Carpenters' Union with Marley, Dingwall made several other requests to be put in the Union, while reminding Marley of his prior promise to Dingwall to do so. Marley would respond, "This is not the right time. Hold on. I'm going to get you in."

Subsequently, Dingwall asked McCullough about getting into the Union. McCullough replied, "Don't piss me off. Because if you piss me off, you're not going to be working. I'm going to let you stay home." McCullough added that he would tell Dingwall when it's the right time to approach Marley and Marten.

In September of 2002, a fellow employee Brian McCoughlin (who was hired after Dingwall), told Dingwall that he had gotten into the Union, Dingwall complained about this to Marley and Marten. They confirmed to Dingwall that McCoughlin had gotten into the Union, and provided Dingwall an unintelligible response to his complaint.

Dingwall finally got tired of waiting to be put into the Union, and decided to join himself. Thus on October 17, 2005 Dingwall went to the Union hall. He filled out an application for membership and a dues deduction form for Local 2090 of the Carpenters' Union. Later on that same day, Dingwall called McCullough to receive his assignment for the next day. McCullough rather than giving Dingwall an assignment, said to Dingwall, "come clean with me, Junior.[8] I know where you went. Tell me what's up… Well, let me tell you something. There is no work here. Go look for work somewhere else." Dingwall called McCullough again from his house

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[6] The case cited by General Counsel in support of its motions, *Folsom Ready Mix,* 338 NLRB 1172 fn. 1 (2003), is clearly not dispositive. There unlike here, the amendment was made at the beginning of the hearing.

[7] I would also note that the record establishes that the Union has already obtained an arbitration award covering the period of time from 2001 to 2003, which would remedy most, if not all of the violations sought by General Counsel's amendment. Indeed these facts could provide a basis for dismissal of these additional allegations in any event. See *Malrite of Wisconsin, Inc.,*198 NLRB 241, 242 (1972).

[8] Junior is Dingwall's nickname.

phone that same day. McCullough again told Dingwall "Look for work somewhere else now."

In McCullough's affidavit, he admitted that he found out that Dingwall had joined the Union, and admitted that he was angry at Dingwall for doing so, because Dingwall had asked for the day off and gave a false excuse. Further, in a transcript of a meeting held on December 9, 2003, where McCullough, Dingwall and Marley were present, McCullough made reference to his refusal to assign work to Dingwall.[9] McCullough asked Dingwall at the meeting, "What were you expecting when you went off on your own and got a Union card? Where did you expect this to lead? Oh, Thank You." The discussion then turned to Dingwall's past efforts to be put in the Union, and McCullough stated that he had spoken to Dingwall about it and said "When the time comes, then I would call him." (referring to Marley). McCullough then directing his comments to Dingwall, added, "And you went out and did it on your own." Later on during the meeting, McCullough commented in reference to Dingwall going to the Union, "You went out and sneaked beyond everyone's back… and got your own card." McCullough also said concerning Dingwall's going to the Union, "You went out and did something you shouldn't have did…" and then added "you know I don't always react ah - I don't always react anyway." Further McCullough admitted at the meeting that he told Dingwall "You probably need to look for work elsewhere."

Prior to October 17, 2003, Dingwall was working regularly, averaging 35 hours per week. After not receiving any work for several weeks, Dingwall on November 6, 2003 called the Union and attempted to put his name on the out-of-work list. However, by mistake he was put through to Union's "corruption" line. After explaining to a woman that he had been working for Trinity, joined the Union, and then was told that there was no work for him, the woman told Dingwall that someone from the Union would contact him. The next day, Dingwall received a call from Maurice Leary, the District Council's Director of Operations and member of the anti-corruption committee. Dingwall explained to Leary what happened to him at Trinity , and Leary asked Dingwall to come to a meeting at the Union with any documents he may have.

Dingwall met on December 2, 2003 with a number of representatives from the Carpenters' Union, including Scott Danielson supervisor of the job referral service and Gary Rothman, Attorney for the Union and the funds. Dingwall furnished an affidavit to Rothman, and agreed pursuant to Rothman's request to try to contact Respondents and tape record conversations with management officials. Dingwall agreed and on December 9, 2003, met with Rothman and Steven Barry of Barry Security, who assisted Dingwall in setting up the surveillance equipment.

On 10:17 A.M., on December 9, 2003, Dingwall telephoned Marley and complained about not being assigned work, after telling McCullough that he had gotten his card. Marley told Dingwall to come to the facility, to discuss the matter in person. Dingwall did so, and wore a wire, so that the conversation was recoded.

Prior to the meeting, Dingwall was instructed by Barry, Rothman and Danielson to tell Marley that he had a meeting set to meet the Union on January 6, 2004, although no such meeting had been scheduled. At the meeting Dingwall told Marley that McCullough had informed him that there was no work for him, after he had obtained his union card. Marley criticized Dingwall for not calling Marley directly as McCullough had allegedly suggested to him. Dingwall explained that he did not call because, Respondent had his number, and based on his

[9] As will be described more fully below, Dingwall at the instigation of the Union, taped several conversations with officials of Respondents.

conversation with McCullough it was "like a slap in the face." Dingwall then notified Marley that he had a date to see the Union on January 6. Marley responded, "So now I am totally fucked." Marley added, "Why did you do that? You let – you didn't just fuck me, you fucked everyone in the company." Marley continued to make similar comments throughout the meeting such as: "so why did you do that… just to fuck me,"; "you're gonna see everything taken away from me because of you,"; "You killed me… my whole family's upset,"; "you know you made a mistake,"; and "Who kicked who in the face?... You more than kicked me in the face… I mean, you and kicked everyone – everyone here."

Marley also made comments concerning his fear of what a Union investigation might mean by stating, "I have to spend thousands and thousands of dollars in lawyer's fees now"… what's gonna happen is they're gonna shut Trinity down… I'm gonna lose Trinity… I'm gonna lose my house."

Towards the close of the meeting Marley said that he would appreciate it if they could do something to "stop it," and he would call Dingwall the next day.

On December 15, 2003, Dingwall called Marley on the phone, and again the call was recorded. Marley asked if Dingwall was willing to work with them, adding that if Dingwall went to the District Council and the company was brought up on charges and shut them down, everyone would be hurt. Marley added that he had gone to dinner with some furniture dealers and they all knew that Dingwall had gone to the District Council and this was embarrassing for Marley. Dingwall responded that he was supposed to go to the Union on January 6 to give them more information, but he didn't have to go. Marley replied that he would help Dingwall and asked Dingwall to come by the next day.

The next day, Dingwall went to the Respondents' facility to collect monies he was owed. At that time an appointment was made to see Respondents' lawyer on January 5, 2004. On January 5, Dingwall met with Marley, but Respondents' lawyer was not present. Marley indicated to Dingwall that he had wanted his lawyer there, but the lawyer couldn't make it. Marley informed Dingwall that the District Council was going to investigate him, and asked Dingwall to help him out. Marley promised Dingwall that he would help Dingwall get a job somewhere else, since Marley's attorney had advised him not to put Dingwall to work for Respondents'. Dingwall reminded Marley that he was supposed to show up at the District Council the next day. Marley asked Dingwall not to show up or take calls from the District Council. Marley repeated several times, that if Dingwall helped him out he'd help Dingwall out. Marley also repeated that he wanted Dingwall to meet with his lawyer. The meeting ended with Marley promising to call Dingwall.

A couple of weeks later, Dingwall met with Marley and Respondents' attorney. Marley and the lawyer offered to give Dingwall some work, if he agreed to sign a paper saying that all he did was to drive trucks , did warehouse work while working for Respondents. Dingwall replied that he would be willing to sign anything, if Respondents would give him work. Dingwall was never given any paper to sign. However, immediately after agreeing to do so, he was put on Respondent Trinity's payroll, began receiving assignments two to three days a week, and was paid at a rate of $36.50 per hour, the contract rate.

Dingwall continued to work for Respondents two to three times a week, until July of 2004. At that time, Dingwall was assigned to and worked at a jobsite in Westchester County. When Dingwall received his paycheck, he noticed that he received Westchester rates, rather than the New York City rate that he had previously received. Dingwall called Marley to complain and Marley responded; "What I pay, I pay you." Dingwall worked another week in Westchester,

and again received Westchester rates. After another unsuccessful call to Marley, Dingwall called the Union and spoke to Joseph Ventura, Business Manager of the District Council. Ventura informed Dingwall that he was under the contract, supposed to be receiving New York City rates, while working in Westchester, since his employer is a New York City firm. Ventura offered to call Marley. Ventura called Marley and told him that Respondents were obligated to pay Dingwall New York City wages under the contract. Dingwall called Marley as well, and asked if he had heard from the Union. Marley responded, "I don't care who called me or what calls or whatever. I have no time to deal with this. You're pissing me off." After that call, Dingwall received no more assignments from Respondents. He made several calls to McCullough, but was never given work. Finally Dingwall gave up calling.

McCullough admitted in his affidavit, that he didn't assign any work to Dingwall, after Dingwall had stated that he would not go to a Westchester job unless he was paid New York City rates.[10]

My factual findings above with respect to the alleged discrimination against Dingwall is based upon the credible and uncontradicted testimony of Dingwall, transcripts of the conversations between Dingwall and Respondents' representatives, as well as admissions from the affidavits of Marley and McCullough. As noted, Respondents did not appear at the trial, and presented no witness or any other evidence.

The facts as detailed above reveal several acts of discrimination by Respondents against Dingwall. Dingwall had been asking Respondents to put him into the Carpenters Union since his hire on September of 2001. Respondents would constantly put him off, and tell him it wasn't the right time. On one occasion, when Dingwall asked McCullough about it, McCullough responded, "don't piss me off, because if you piss me off, you're not going to be working." This comment by McCullough which represents a clearly unlawful threat to discharge Dingwall,[11] is also highly probative of Respondents' motivation when it ceased assigning Dingwall work, after he finally gave up waiting to be put into the Union and joined the Union on his own initiative on October 17, 2003.

Later, the same day, Dingwall called McCullough for his assignment for the next day. McCullough told Dingwall that he knew where Dingwall had gone, there is no work for him, and to look for work somewhere else. McCullough in his affidavit concedes that he found out that Dingwall had joined the Carpenters' Union, and McCullough's comments at the December 9, 2003 meeting with Dingwall and Marley make clear Respondents' motivation in not assigning Dingwall any work on October 17. McCullough asked Dingwall what he was expecting when "he went on your own to get a Union card," told him that Dingwall had "sneaked behind everybody's back… and got your own card," and that Dingwall "did something he shouldn't have did" [sic].

The above evidence overwhelmingly demonstrates that a motivating factor in Respondents' decision not to assign Dingwall work on October 17, 2003 was Dingwall's protected union activities. Although phrased in the complaint as a refusal to assign work, Respondents' actions on October 17, 2003 at the time amounted to a discharge, by telling him that there is no work for him and to look for work elsewhere. Thus although he was not

[10] Dingwall admitted that he had informed Marley that he would not work anymore in Westchester unless he received New York City rates.

[11] I make no finding of an independent violation of Section 8(a)(1), since the complaint does not so allege, and no amendment to the complaint was offered.

specifically informed that he was discharged, it was not essential that magic words be used where the intent is clear. *American Linen Supply,* 297 NLRB 137, 145, (1989), *enfd.* 935 F.2d 1428 (8th Cir. 1991), *rehearing den.* (1991).

I find therefore that whether Respondents' conduct towards Dingwall on October 17, 2003 is considered to be a refusal to assign work or a discharge, a motivating factor in such action was Dingwall's protected conduct. *Wright Line,* 251 NLRB 1083 (1980), *enfd* 662 F.2d 889 (1st Cir. 1981), *cert. den.* 455 U.S. 989 (1982). Since Respondents have adduced no evidence that it would have taken the same action against Dingwall absent his union activities, I conclude that Respondents violated Section 8(a)(1) and (3) of the Act by discharging and or ceasing to assign Dingwall work on and after October 17, 2003.

The evidence reveals that after Dingwall agreed to cooperate with Respondents and falsely state that he did not perform carpenters work, Respondents partially reinstated Dingwall in January of 2004, by assigning him work two to three times a week.[12]

Subsequently, in July of 2004, Dingwall, after complaining about not receiving contract wages for working for Respondents in Westchester, was terminated once again. The evidence establishes that Dingwall complained to the Union about the issue, and that the Union's business manager called Marley and informed him that Respondents were required to pay Dingwall New York City rates for work on Westchester jobs, as Dingwall had asserted.

After that call, Dingwall no longer received any assignments from Respondents. Further evidence establishing the motivation for Respondents' conduct towards Dingwall, includes Marley's comments to Dingwall that Dingwall was "pissing him off", by calling the Union, as well as McCullough's admission in his affidavit that he did not assign Dingwall to jobs after Dingwall's complaint about Respondents refusal to pay New York City rates on Westchester jobs.

It is well settled that an employee's invocation of a right under a collective bargaining agreement, even where it encompasses a refusal to work, constitutes protected concerted activity. *City Disposal Systems,* 465 U.S. 822 (1984). Here Dingwall was asserting his rights under the Carpenters' contract, by complaining about the refusal of Respondents to pay him New York City rates for work in Westchester. As was the case with Respondents' conduct towards Dingwall in October of 2003, their refusal to assign him any work on and after July of 2004, amounts to a discharge, although the words discharge or termination were not used. *American Linen Supply, supra.*

The evidence is clear that a motivating factor in Respondents' decision to terminate Dingwall in July of 2004 was his protected conduct in asserting his contract rights. Since Respondents have adduced no evidence to rebut that finding, I conclude that Respondents have violated Section 8(a)(1) of the Act by such conduct. *City Disposals, supra.*

Furthermore, I also conclude, in agreement with General Counsel, that Respondents' discharge of Dingwall in July of 2004, is also violative of Section 8(a)(3) of the Act. Thus Dingwall contacted the Union about his complaint about Respondents' failure to pay him wages due under the contract. This amounts to Union activity. *Wilson Trophy Co.,* 307 NLRB 509, 512, *enfd.* 989 F.2d 1502 (8th Cir. 1993). Respondents became aware of Dingwall's complaint when Ventura called Marley about the matter, and Marley's animus towards such activity is

[12] Previously Dingwall had been working 35 hours per week.

established by Marley telling Dingwall that he was "pissing him off," by contacting the Union. Moreover, the evidence of animus towards Dingwall for his prior Union activities, which motivated his unlawful discharge in October of 2003, is also relevant to his termination in July of 2004. Therefore a strong prima facie case exists that a motivating factor in Dingwall's July discharge was his activities on behalf of the Carpenters' Union. That finding stands unrebutted, in view of Respondents failure to adduce any evidence of non discriminatory reasons for its decision.

Accordingly, Respondents' discharge of Dingwall in July of 2004, is also violative of Section 8(a)(1) and (3) of the Act. I so find.

VII. The Alleged Discrimination Against Marco Catalan

Marco Catalan began working for Respondents in June of 2002. He was on the payroll of Respondent MMMZ, although he like numerous other employees, as detailed above, preformed carpenters work, alongside employees of Respondent Trinity, who were covered by the Carpenters' contract.

On a Thursday afternoon in August of 2004, Catalan was working on a job installing furniture at 500 5th Avenue, along with Joseph Moeller the foreman, and two other non union employees. At around two thirty to three thirty, a representative of the Carpenters' Union arrived on the job. He asked the employees if they had Union cards. The replied that they did not. He also asked for the Union card of Moeller, who produced a card, since he was a Union member. The Union official confiscated Moeller's card, and told Moeller that he was risking his career or job future by working with non-union personnel. At that point, Moeller called Respondents' office, and told McCullough what had happened. McCullough instructed Moeller to leave the building with the employees.

Later on that same Thursday evening, Catalan called McCullough to get his assignment for Friday. McCullough told Catalan that there was no work. On Friday, Catalan called again to ask for work for Monday. Once more, McCullough informed Catalan that there was no work for him. The same thing occurred when Catalan called on Monday to ask for his assignment for Tuesday. Catalan's undisputed testimony establishes that Respondents had plenty of work available during these days.

When Catalan called on Tuesday to ask for work on Wednesday, McCullough told Catalan to come into the facility to meet with Marley. On Wednesday, Catalan met with Marley, as requested. No one else was present. Marley informed Catalan that he had a lot of problems, because Local 124 wasn't giving him the service he needed, and was causing him problems. Therefore he was going to have to let Catalan go, as well as all the other workers who signed up with Local 124.[13] However, no one else, other than Catalan was discharged at the time.

A few days after Catalan's discharge, Eddie Fernandez called Catalan on the phone, and informed him that Marley and McCullough were saying that Respondents had terminated Catalan because he had been the person who had called the Union.

[13] As will be detailed more fully below, Respondents' recognized and signed a contract with Local 124 in March 2004, to represent Respondent MMMZ's employees. I find below that such conduct was violative of Section 8(a)(1), (2) and (3) of the Act.

As noted above, Respondents did not appear, and therefore adduced no evidence as to why they discharged Catalan.

The above evidence discloses a strong prima facie showing that Respondents' discharge of Catalan was unlawful. It is clear that an employer violates the Act when it discharges an employee because it mistakenly believed that the employee engaged in Union activity. *Salisbury Hotel,* 283 NLRB 685, 686 (1987); *Metropolitan Orthopedic Association, P.C.,* 237 NLRB 427, 429 (1978).

Here, Fernandez's statement to Catalan, that Catalan was terminated because Respondents believed that Catalan had called the union, establishes both the motivation for the discharge, as well as Respondents belief that Catalan had called the Union. In that regard it is also significant that on the same day that Catalan was denied work, he was one of the employees on a job, which was disrupted by the presence of a Carpenters' representative, who asked for their Union cards, and confiscated the Union card of foreman Joe Moeller. It is clear from the above evidence, that Respondents suspected that Catalan had notified the Carpenters' Union of the fact that non-union workers of Respondents were working at the Fifth Avenue jobsite.

While there is some evidence in the record that Marley told Catalan that he as well as other employees were being let go, because of problems with Local 124, I find the explanation pretextual, since no employees other then Catalan was terminated at the time. Further, I agree with General Counsel that even if Marley's words were true, Catalan's discharge would be unlawful, as being motivated by his joining Local 124. *Diamond Detective Agency, Inc.,* 345 NLRB #16 (2005).

Since, once more, General Counsel's strong prima facie stands unrebutted, I conclude that Respondents discharge of Catalan violated Section 8(a)(1) and (3) of the Act.

VIII. The Alleged Assistance to Local 124

As related above, Dingwall agreed to assist the Union in investigating Respondents, submitted an affidavit, and recorded several conversations with Respondents' representatives. Barry submitted a report to Rothman dated February 24, 2004. This report, which suggested a connection between Respondent Trinity and Respondent MMMZ convinced Rothman that further investigation was needed. He therefore engaged the services of Polvere, (a forensic accountant) to investigate and audit Respondents. On March 1, 2004, Rothman advised Respondent Trinity that Polvere would be performing an audit on Responodent Trinity and instructing it to cooperate with the audit.

Employees Catalan and Aguilar testified credibly and consistently, that while they were working on a job with other installers, Fernandez called them into a room where Marley was on the speakerphone. Marley told the employees present that he was going to put them into "the Union."[14] He instructed the employees to report to the facility the next day, at 6:00 A.M., to meet with him for that purpose. Marley also told the employees that this would be "best for the company." A few minutes later Catalan went into another room and placed a call to Marley. Catalan asked Marley if employees would be receiving a complete benefit package and if the employees would be belonging to the Carpenters' Union. Marley replied that the employees would not be receiving a complete benefit package and would not be put into the Carpenters'

[14] Marley did not specify which Union he intended to put the employees into.

Union.

The next day, Catalan and Aguilar went to Respondents' premises. There were approximately 15-20 employees of Respondent MMMZ present.[15] Marley introduced the employees to James Bernardone, Secretary-Treasurer of Local 124. Marley then instructed the employees to go up two by two, to a conference room on the second floor. When the employees got upstairs, Bernardone was in the room, a long with another representative from Local 124. They gave out business cards to the employees, as well as cards entitled "application and check off authorization."[16] Bernardone asked the employees to fill out and sign the cards, so that the Union would fight for a contract. He asked if there are any questions. Some employees asked about what benefits they could expect. Bernardone replied that he would seek to obtain benefits such as vacations, holiday, and a medical plan, but he would need to talk to Marley about the benefits. As a result of the above procedure, Local 124 obtained cards purportedly signed by twenty three employees. Fifteen of the cards were dated March 16, 2004, four were dated March 17, 2004, and four cards were undated. The record is unclear as to how many employees were employed by Respondent MMMZ at the time. According to employee Aguilar, he estimated that Respondent MMMZ employed 15 installers, 8 warehouse employees, and 3 drivers.

The above findings with respect to the circumstances surrounding the solicitation of cards for Local 124, is based on the credible and mutually corroborative testimony of Aguilar and Catalan. Bernardone's testimony, to the extent that it differs from that of Aguilar and Catalan is discredited. He asserts that he, along with Kevin Watts, President of Local 124 obtained the cards from employees on two or three occasions at the shop inside or outside the shop, but he did not recall Markey being there at any of these times. Bernardone concedes that he received permission from a supervisor to enter the premises, but he was unsure about precisely where he and Watts spoke to employees, what time of day it was when he collected cards, or what he said to employees when he obtained the cards. I found Bernardone's testimony to be vague, uncertain, imprecise, and generally unpersuasive. I therefore credit Aguilar and Catalan, that the cards were obtained by Local 124, after Marley had informed the employees a day or two before the cards were signed that he intended to put them into the Union, which was best for the company, and that they should come in for a meeting for that purpose. Further Marley introduced them to Bernardone and directed the employees to speak to Bernardone in Respondents' conference room, two by two.

I also do not credit Bernardone's vague and uncertain testimony that he was contacted by an employee from MMMZ, to come down and organize the employees, His failure to recall the name of the employee who allegedly contacted him, when they called or what he said to such employee, I find quite compelling. This leads me to conclude, which I do that instead Marley or some other official of Respondents' called Local 124 and solicited the Union to organize Respondent MMMZ's employees. In this regard, I note the timing of the organizational activities, coming two weeks after Respondent Trinity was notified that it would be audited by the Carpenters' Union. In view of my findings above, that Respondents engaged in a practice of assigning carpentry work to Respondent MMMZ's employees, and failing to cover such employees under the Carpenters' Contract as it was obligated to do, Respondents were

[15] The employees included installers, as well as employees who work in the warehouse and drivers.

[16] Although the card's title is as set forth above, the text of the card says nothing about membership or authorization for collective bargaining. It merely mentions authorization for the Employer to deduct dues and fees.

obviously aware that the audit would reveal such conduct. Therefore, I find that Respondents in an attempt to forestall or alleviate that finding, decided to bring in Local 124, and sign a contract with that union covering Respondent MMMZ's employees. Respondents likely believed that once it informed the auditor and the Carpenters' Union that it had signed a contract with Local 124[17] and that Respondent MMMZ's employees were receiving at least some union benefits, that the Carpenters' Union would not pursue further action against them.

I also note the absence of any testimony from Marley, refuting the above testimony of Aguilar and Catalan concerning Marley's role in the solicitation of cards for Local 124. Such absence gives rise to an adverse inference that his testimony would be adverse to that of Respondents on this issue. I so find. *International Automated Machines,* 285 NLRB 1122, 1123 (1987); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024-1025 (1987).

Subsequently, Respondent MMMZ and Local 124 signed a contract on April 23, 2004, effective May 1, 2004. It covers a wall to wall unit,[18] and contains a union security clause, and a checkoff clause. After the contract took effect, dues were deducted from the salaries of Catalan, Aguilar, as well as other employees.

As General Counsel correctly observes, "the Board consistently regards supervisory participation in the solicitation of authorization cards for a union, whether the solicitation is explicit or implicit, as unlawful." *Mar-Jam Supply Co.,* 337 NLRB 227, 353 (2001). Here, I have found that Respondents called Local 124 in order to organize Respondent MMMZ's employees. That finding in itself would be sufficient to invalidate the cards and make the recognition and contract unlawful. Even apart from that finding, the evidence discloses that Marley told Respondents' employees that he wanted to put them in the Union, that it would be best for the company, instructed them to meet with Local 124, and then introduced the employees to and directed them to meet with Local 124 representatives when the employees signed union cards. These findings are more than sufficient to conclude that Respondents rendered unlawful assistance to Local 124, rendering the cards invalid and the subsequent recognition and signing a contract unlawful. *Mar-Jam, supra; Kosher Plaza Supermarket,* 313 NLRB 74, 85 (1993), *Famous Casting Corp.,* 301 NLRB 404, 407 (1991); *Vernitron Electrical Components,* 221 NLRB 464, 465 (1975).

By such conduct Respondents have violated Sections 8(a)(1) and (2) of the Act. Since the contract signed by Respondents and Local 124 contains a union security clause, Respondents have also violated Section 8(a)(3) of the Act by signing and enforcing such a contract. *Famous Casting, supra.*

Conclusions of Law

1. Respondents Trinity Carpentry and Systems Installations Inc. and MMMZ Consultants, Inc. are a single integrated enterprise and a single employer and are employers engaged in commerce within the meaning of Section 2, 2(6) and (7) of the Act.

2. District Council for New City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Local 124, International Union of Journeymen and Allied Trades, are labor organizations within the meaning of Section 2 (5) of the Act.

[17] I note that on May 6, 2004, the first day of Polvere's audit, Marley informed him that Respondent MMMZ had signed a contract with Local 124.

[18] The recognition clause covers all employees of Respondent MMMZ.

3. Since on or about April 14, 2004, Respondents have refused to bargain with the Carpenters' Union, by failing to abide by Respondents contract with the Carpenters' Union, and have thereby violated Section 8(a)(1) and (5) of the Act.

4. Respondents have refused to assign work to and or terminated the employment of employee Fabian Dingwall because of his activities on behalf and support for the Carpenters' Union and because he engaged in other protected concerted activities, and has thereby violated Section 8(a)(1) and (3) of the Act.

5. Respondents refused to assign work to and or terminated the employment of Marco Catalan, because they believed that he engaged in activities on behalf of or in support of the Carpenters' Union, and has thereby violated Section 8(a)(1) and (3) of the Act.

6. Respondents unlawfully assisted Local 124 and recognized and signed a contract with Local 124, covering employees employed by Respondent MMMZ, notwithstanding the fact that Local 124 did not represent an uncoerced majority of such employees. By such conduct Respondents' have violated Section 8(a)(1) and (2) of the Act.

7. Respondents violated Section 8(a)(1) and (3) of the Act, by signing a contract with Local 124 covering employees of Respondent MMMZ, containing a union security clause, notwithstanding the fact that Local 124 did not represent an uncoerced majority of employees.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2, 2(6) and (7) of the Act.

The Remedy

Having found that Respondents committed various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action, designed to effectuate the policies of the Act.

I shall recommend that it offer reinstatement to Marco Catalan and Fabian Dingwall to their former positions of employment, and make them whole for the discrimination against them, plus interest, as computed in *F.W. Woolworth,* 90 NLRB 289 (1950) and *Horizons for the Retarded,* 283 NLRB 1173 (1980).

I shall also recommend that Respondents abide by its contract with the Carpenters' Union, to the extent that it assigns and has assigned carpenters work to employees who should be or should have been covered by said contract.

I also recommend that Respondents be ordered to make whole its employees, with interest, for any losses suffered by reason of their failure to abide by the collective bargaining agreement between the Carpenters' Union and Respondent Trinity, with backpay for lost wages to be computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970) *enfd.* 444 F.2d 502 (6th Cir. 1971). The Respondents are also required to make whole their employees by making all unpaid fringe benefit fund contribution payments since April 14, 2004, as provided for by the above-mentioned collective-bargaining agreement,[19] and by reimbursing

[19] Because the provisions of employee benefit fund agreements are variable and complex, I recommend to leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy the "make whole" remedy.

Continued

employees for any expenses ensuing from the Respondents' failure to make such contribution payments, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (9180), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981). All payments to the fringe benefit funds and the employees shall be made with interest to be computed in the manner prescribed in *New Horizons, supra*.

I shall also recommend that Respondents cease and desist from recognizing or enforcing or applying its unlawful contract with Local 124, and reimburse the employees for dues unlawfully withheld from their salary, as a result of their enforcement of the contract plus interest as provided in *New Horizons, supra; North Hills Office Service,* 342 NLRB #25, ALJD Slip op. p. 10 (2004).

While there is some evidence in the record that Respondent Trinity may be closed, the record is unclear as to this issue. Further, there is evidence in the record that Respondent MMMZ is still operating in some fashion. I shall therefore recommend the normal remedies, including reinstatement, as well as the normal posting requirement. If Respondents are in fact closed, compliance will so determine, and in such event, Respondents will be required to sign and mail the notice to its employees employed on and after October 17, 2003, the date of Respondents' initial unfair labor practice.

Based upon the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended [20]

ORDER

The Respondents, Trinity Carpentry and Systems Installations Inc. and MMMZ Consultants, Inc., Richmond Hill, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Discharging, or refusing to assign work to their employees, because said employees engaged in activities or Respondents believed that they engaged in activities on behalf of or in support of District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or because said employees engaged in other protected concerted activities.

(b) Failing to abide by or apply all provisions of their collective bargaining agreement with the Carpenters' Union to all of their employees covered by said contract, including employees employed by Respondent MMMZ.

(c) Recognizing and bargaining with, or signing a contract with Local 124, International Union of Journeyman and Allied Trades Union, unless and until Local 124 is certified by the Board as the collective bargaining representative of their employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Merryweather Optical Co., 240 NLRB 1213, 1216 fn. 7 (1979).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Fabian Dingwall and Mario Catalan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Dingwall and Catalan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Dingwall and Catalan, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Reimburse all former and present employees employed at their facility for all initiation fees, dues, and other moneys that may have been exacted from them as a result of Respondents signing a contract with Local 124, with interest as provided for in the remedy section of this decision.

(e) Make whole, with interest, all unit employees for any losses they may have suffered as a result of the Respondents' unlawful failure, and refusal to pay the wage rates set forth in the collective-bargaining agreement with the Carpenters' Union.

(f) Make all fringe benefit fund contributions, and make all unit employees whole for any expenses resulting from the Respondents' failure to make the required pension and other fringe benefit contributions, with interest, as required by the collective-bargaining agreement with the Carpenters' Union.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Richmond Hill, New York, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 17, 2003.

(i) File with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C., January 17, 2006

_____
Steven Fish
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge, or refuse to assign work to our employees, because said employees engaged in activities or we believe that they engaged in activities on behalf of or in support of District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or because said employees engaged in other protected concerted activities.

WE WILL NOT fail to abide by or apply all provisions of our collective bargaining agreement with the Carpenters' Union to all of our employees covered by said contract, including employees employed by Respondent MMMZ Consultants Inc.

WE WILL NOT recognize and bargain with, or sign a contract with Local 124, International Union of Journeyman and Allied Trades Union, unless and until Local 124 is certified by the Board as the collective bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Fabian Dingwall and Mario Catalan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dingwall and Catalan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Dingwall and Catalan, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL reimburse all former and present employees employed at our facility for all initiation fees, dues, and other moneys that may have been exacted from them as a result of our signing a contract with Local 124.

WE WILL make whole, with interest, all unit employees for any losses they may have suffered as a result of our unlawful failure and refusal to pay the wage rates set forth in the collective-bargaining agreement with the Carpenters' Union.

WE WILL make all fringe benefit fund contributions, and make all unit employees whole for any expenses resulting from our failure to make the required pension and other fringe benefit contributions, with interest, as required by the collective-bargaining agreement with the Carpenters' Union.

TRINITY CARPENTRY AND SYSTEMS INSTALLATION, INC., and MMMZ CONSULTANTS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.